BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

REBECCA DAVENPORT	)	
Claimant	)	
VS.	)	
	)	Docket No. 165,642
HALLMARK CARDS, INC.	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals from an Award rendered by Administrative Law Judge Bryce D. Benedict on May 23, 1997. Respondent also asks for review of several of the findings. The Appeals Board heard oral argument November 4, 1997.

APPEARANCES

Claimant appeared by her attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, John David Jurcyk of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, James B. Biggs of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record listed in the Award and has adopted the stipulations stated in the Award.

ISSUES

The parties have asked for review of the following issues:

(1) Did claimant meet with personal injury by accident arising out of and in the course of her employment? Respondent contends claimant has not met her burden on this issue. According to respondent, the record contains no credible medical opinion that claimant's injury was caused by her work. Respondent also argues that claimant's injury was caused when she cinched the saddle on a horse while taking horse riding lessons with her daughter.

(2) What is the date of accident? Claimant originally alleged February 4, 1991, as the date of accident. The ALJ modified the date to

January 14, 1993, the date claimant returned to work after a vocational rehabilitation program.

(3) Did claimant make a timely written claim? Respondent contends that if February 4, 1991, is the date of accident, claimant did not make a written claim within the time limits specified in K.S.A. 44-520a.

(4) What is the nature and extent of claimant's injury and disability? The ALJ found claimant has an 8 percent general body disability but denied claimant's request for a higher work disability. He denied work disability because he found claimant had voluntarily quit comparable wage employment she was capable of performing. According to claimant, she left the comparable wage employment because she was unable to do the job. She also contends that even if work disability is denied, her functional impairment is higher than the ALJ found it to be. Respondent, on the other hand, contends the claimant sustained, at most, a scheduled injury and is not entitled to benefits for a general body disability.

(5) Is claimant entitled to additional vocational rehabilitation? The ALJ denied claimant's request for vocational rehabilitation because he found claimant voluntarily quit a job paying comparable wage.

(6) Did the ALJ err when he denied claimant's request to submit rebuttal testimony? Claimant asked the ALJ to permit rebuttal testimony in response to testimony offered by respondent indicating claimant's work was satisfactory and her job was not in jeopardy at the time she quit. The ALJ ruled that the testimony could have been offered in claimant's case in chief and he therefore refused to allow additional testimony. Claimant now asks the Board to remand the case to allow claimant to introduce such rebuttal testimony.

(7) Respondent initially contended the Award did not accurately reflect the amount of temporary total disability benefits paid. According to respondent, an error was made at the time stipulations were taken and, as a result, the record did not accurately state the amount of temporary total disability paid. On appeal the parties have now stipulated that respondent paid 78.43 weeks of temporary total disability benefits at the rate of $238.44 per week for a total of $18,700.85. The parties have agreed to, and the ALJ signed, an Award Nunc Pro Tunc reflecting this change.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds that the Award should be modified. For reasons stated below, the Board finds claimant is entitled to benefits for a 14 percent disability at the shoulder level for a date of accident in May 1994. The Board also finds claimant is not entitled to additional vocational rehabilitation. Claimant's request to remand the claim is denied.

Findings of Fact

(1) Claimant began working for respondent Hallmark Cards in 1978. Her duties included repetitive hand work assembling greeting cards. She folded, taped, glued, packaged, and boxed. According to claimant, she handled an average of about 300 cards per hour.

(2) On February 4, 1991, she reported to the company nurse with complaints of pain and swelling in her right hand and thumb. Claimant had experienced aches and pains before this, but this was the first time she noticed swelling. Claimant was referred to Dr. Delgado but continued to work. Dr. Delgado prescribed exercise and therapy. Although Dr. Delgado's records are not in evidence and Dr. Delgado did not testify, claimant testified Dr. Delgado did recommend work restrictions and those restrictions were accommodated by respondent.

(3) In February or March of 1991, after claimant had reported complaints to the company nurse and during the period claimant was being treated by Dr. Delgado, claimant's arm went numb when she pulled on the cinch to saddle a horse while her daughter was taking lessons. Claimant testified the symptoms from this incident were temporary.

(4) Claimant was not satisfied with her treatment from Dr. Delgado and respondent sent her to see Dr. Mark T. McQuain. Claimant first saw Dr. Mc Quain July 1, 1991, and at that time claimant complained of right wrist and right thumb pain with the pain extending into the elbow and shoulder. Dr. McQuain referred claimant to Dr. J. Douglas Gardner, a rheumatologist. Dr. Gardner reported that there was no evidence of an inflammatory arthritis. Dr. McQuain advised claimant he could not assign a specific label for her problem. He found no neurologic, orthopedic, or rheumatologic disease entity to which he could attribute her symptoms. He indicated her problem was caused by daily activities, a portion of which was her work for respondent. He rated her impairment as 40 percent of the right upper extremity. Although he noted claimant complained of pain extending into the elbow and shoulder, he found no impairment either at or above the elbow. As restrictions he recommended claimant limit her activities to the light work level, limiting her lifting to 20 pounds maximum and 10 pounds frequently. He also recommended that she avoid repetitive tasks with her upper extremities.

(5) At claimant's request, Dr. McQuain referred claimant to the Mayo Clinic where she was seen by Dr. Ann H. Schutt. Dr. McQuain testified that Dr. Schutt's diagnosis and restrictions were essentially the same as his.

(6) Claimant was off work from November 1991 until January 1993. Claimant testified that in November of 1991, respondent sent her home.

(7) Beginning in June of 1992, claimant underwent a vocational assessment. As a result, claimant agreed to a vocational rehabilitation plan which involved training at respondent's expense for a production clerk position with respondent. The training included typing, computer training, math, science, and data processing. Claimant testified she experienced a great deal of pain during the training and that she dropped a second typing class because of pain in her hand, elbow, and shoulder into her neck.

(8) In January 1993, respondent offered, and claimant began, the permanent clerical position. After a two-week training period, she then started February 8, 1993. She worked half-days through February 18, 1993, and then worked full-time for three days. After a short

time, claimant began suffering pain and numbness in her right hand and arm up into her neck. Claimant advised her supervisor of the numbness and was then referred to Dr. Lynn D. Ketchum who prescribed medication and light duty, and recommended continued use of the brace prescribed by Mayo.

(9) Respondent did not allow claimant to return to work with a brace but sent her to Dr. John B. Moore, IV, in April 1993. Dr. Moore testified he could not find signs of injury but that her symptoms seemed to center around her radial nerve. As of April 30, 1993, when he first saw her, Dr. Moore released claimant to full duty. He saw her again on May 21, 1993, but made no additional findings. He testified he felt she could perform clerical duties. He also testified claimant made no complaints to him outside the thumb and hand areas.

(10) Claimant was again off work from approximately the end of February 1993 to January 1994. She returned to another clerical job in January 1994 and continued that job until she quit in May 1994. Claimant testified that she quit because of the pain. She stated that because of the pain she was practically in tears and had headaches at night. She finally became tired of living on pain medication and told her supervisor she could not continue to work. On cross examination, she acknowledged that she felt she was not able to do the typing and had anxiety over trying to do the typing. The job required that claimant type from one to two pages per day. Claimant testified that if the typing were removed from the job she could perform the other duties.

(11) Ms. Sarah E. Rainey testified that she saw claimant on referral from Menninger for the purpose of evaluating claimant's ability to decode letters, sound, and written words. She testified that claimant has weakness in decoding and making the relationship of letter to sound. As a result, she has a spelling deficiency. She has a tendency to overlook incorrect omissions from or additions to written words. She also testified that Menninger's report shows claimant's abilities at sound blending as low as kindergarten, first grade; her auditory processing as high as fourth grade; comprehension and knowledge ranged from grade 3.9 to 7.7.

(12) Claimant was examined and her impairment evaluated by Dr. Daniel D. Zimmerman at the request of claimant's counsel in March 1996. He rated the impairment as 14 percent at the shoulder level which he converted to 8 percent of the whole body. He did find permanent impairment in the right shoulder.

(13) Claimant was seen by Dr. Sharon L. McKinney in July 1994 and again in September of 1996. She rated claimant's functional impairment as an 18 percent impairment to the whole body. In 1994 claimant complained of pain in the shoulder girdle. In 1996, Dr. McKinney noted weakness in the right shoulder girdle muscles, right neck muscles, and weakness in the right arm and hand.

Conclusions of Law

(1) Claimant did suffer personal injury by accident arising out of and in the course of her employment. This finding is based on claimant's consistent testimony and the consistent history she gave the medical providers. As a part of this conclusion, the Board also agrees with and adopts the finding by the ALJ that the incident cinching the saddle did not cause a permanent injury. Claimant testified it was temporary and no physician has indicated anything more than a possibility that the cinching incident could cause permanent injury.

(2) The Board finds the date of accident was May 31, 1994. The facts of this case present problematic issues as to the date of accident. As respondent points out, claimant has alleged the date of accident was February 4, 1991, and the ALJ amended the date to January 14, 1993, without request from either party. The Board agrees the ALJ may and should amend the date where the evidence dictates that he/she do so. But the Board does not agree with the date chosen by the ALJ in this case. The ALJ used the date claimant returned to work after a period of vocational rehabilitation. The Court of Appeals has issued several decisions regarding date of accident of mini-trauma injuries, some after the decision by the ALJ in this case. But none of the decisions would, in our view, support using the date a claimant returns to work as the date of accident in this case.

The Court of Appeals has held that the date of accident in a repetitive trauma case is the last day claimant performs services for his or her employer and is required to stop working as a direct result of the pain and disability resulting from the injury. Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). But the Berry decision does not specifically address a circumstance where, as here, the claimant leaves work several times as a result of the injury and changes jobs in the work for respondent. Nevertheless, the Berry decision appears to apply here.

The Board finds claimant experienced additional permanent impairment after she returned to work from her vocational training program in January of 1993. Claimant testified the numbness was different than she had experienced before. The Board also finds that claimant did leave work at the end of May 1994 as a direct result of the pain and disability resulting from the injury. The Berry decision calls for application of legal fiction used to determine what law applies and when permanent disability benefits begin in cases where assignment of a date of accident cannot always be tied to any specific event and where the injury occurred over a period of time.

(3) Claimant made a timely written claim. Written claim was made no later than May 1992. Even if February 4, 1991, were used as the date of accident, claimant received authorized medical treatment through at least November 1991. The 200 days for making claim is from the date of accident or last compensation. K.S.A. 440-520a. The Application for Hearing in this case was a written claim filed less than 200 days from last compensation provided.

(4) For an accident in May 1994, injury to the shoulder is a scheduled injury and the maximum number of weeks of benefits is 225. K.S.A. 44-510d.

(5) The Board finds claimant sustained a 14 percent permanent partial impairment to the right upper extremity at the shoulder level. This finding is based on the testimony of Dr. Zimmerman.

(6) For accidents in May 1994, vocational rehabilitation training is not a mandated benefit; employers may choose to provide such training but it can not be ordered. K.S.A. 44-510g. Claimant's request that the Board order additional vocational rehabilitation is denied.

(7) Because the Board has found claimant has a scheduled injury, claimant is not entitled to work disability benefits. K.S.A. 44-510d and 44-510e. Claimant's proposed rebuttal testimony would be relevant only to whether the circumstances of claimant's

departure from employment with respondent would allow her to receive work disability. Since she does not have a general body disability, the issue is moot.

(8) The temporary total disability benefits paid during the vocational rehabilitation program, up to a maximum of 26 weeks, will not be deducted from the scheduled number of weeks before applying the percentage of disability to calculate the weeks of permanent partial disability benefits to be paid. Although the law has since changed, at the time these benefits were paid, the law provided that such temporary total disability benefits would not be deducted in cases involving a scheduled injury. K.S.A. 1991 Supp. 44-510g(g). As a result, 26 weeks of the total 78.43 weeks of temporary total disability will not be deducted but the remaining 52.43 weeks will be deducted from the total of 225 weeks before applying the 14 percent disability to determine the weeks of permanent partial disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict, dated May 23, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rebecca Davenport, and against the respondent, Hallmark Cards, Inc., a qualified self-insured, for an accidental injury which occurred May 31, 1994, and based upon an average weekly wage of $357.66 for 78.43 weeks of temporary total disability compensation at the rate of $238.44 per week or $18,700.85, followed by 24.16 weeks at the rate of $238.44 per week or $5,760.71, for a 14% permanent partial disability at the shoulder level, making a total award of $24,461.56, which is due and owing in one lump sum less amounts previously paid.

Claimant's request for remand is denied.

The Appeals Board approves and adopts all other orders in the Award that are not inconsistent herewith.

IT IS SO ORDERED.

Dated this _____ day of July 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
John David Jurcyk, Lenexa, KS
James B. Biggs, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director